# Re Abu Bakar bin PC Kuaya; ex parte Navaratnam a/l Sivasamboo

HIGH COURT (KUANTAN) — BANKRUPTCY NO 29–185 OF 1996
RAMLY ALI JC
3 JANUARY 2002

***Bankruptcy*** *— Practice and procedure — Costs — Taxation of costs — Whether O 59 r 4 of the Rules of the High Court 1980 was applicable to bankruptcy proceedings — Whether court can entertain judgment creditor's application for taxation of costs before conclusion of bankruptcy proceedings — Whether judgment creditor had to wait until conclusion of bankruptcy petition to have their bills of costs taxed — Bankruptcy Rules 1969 r 69(1)*

***Civil Procedure*** *— Appeal — Appeal from registrar — Appeal against ruling of deputy registrar to the judge in chambers — Whether ruling of deputy registrar dealt with final rights of parties — Whether ruling was a 'decision' as defined under s 3 of the Courts of Judicature Act 1964 — Whether ruling was appealable under O 56 r 1 of the Rules of the High Court 1980*

The judgment creditor issued a bankruptcy notice ('BN') against the judgment debtor. Thereafter, the judgment debtor filed an affidavit, vide encl 5A, under r 95 of the Bankruptcy Rules 1969 ('the Rules') to set aside the bankruptcy notice. Before the hearing of encl 5A, the judgment debtor raised a preliminary objection to the effect that the BN was void ab initio. The senior assistant registrar ('the SAR') overruled the preliminary objection and ordered that costs shall be in the cause. After hearing encl 5A, the SAR dismissed the application with costs. The judgment debtor then appealed against the decision of the SAR to the judge in chambers vide encl 11A and encl 15. Enclosure 11A was dismissed with costs by the judge in chambers. Before the hearing of the appeal in encl 15, the judgment debtor filed another application in encl 25C for the purpose of adducing further evidence before the judge. When the appeal in encl 15 came up for hearing, the judgment debtor withdrew the appeal and the judge then struck off the appeal with costs. Based on all these orders made by the SAR and the judge in respect of costs against the judgment debtor, the judgment creditor filed a notice in encl 27 together with bill of costs to be taxed by the deputy registrar. The judgment debtor's preliminary objection against the said notice and the bill of costs was overruled and dismissed with costs and the deputy registrar proceeded to deal with the matter accordingly. This was an appeal by the judgment debtor against the decision of the deputy registrar dismissing the judgment debtor's preliminary objection in respect of a notice filed by the judgment creditor. The judgment debtor's argument was that since the bankruptcy proceedings had not been completed yet, the hearing of the notice and bill of costs musts be deferred until the final disposal of the bankruptcy proceedings.

**Held**, dismissing the appeal:

(1) The ruling made by the deputy registrar, which was the subject matter of the appeal, arose from a preliminary objection made by the judgment debtor. The ruling made by the deputy registrar was not a final decision on the question of taxation of costs. Both parties would have the chance to argue their respective cases during the hearing before the final decision on the taxation of the costs was made (see pp 533H–534B).

(2) The right of appeal must be based on express provisions of law and in the present case, the appeal against the decision of the deputy registrar to the judge in chambers was governed by O 56 r 1 of the RHC. The word 'decision' in O 56 r 1 of the RHC as defined under s 3 of the Courts of Judicature Act 1964 ('the CJA') meant '... judgment, sentence or order but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'. The ruling of the deputy registrar did not deal with the final rights of the parties and gave no final decision on the main issue in dispute, but was merely on a matter of procedure. As such, the said ruling was not a 'decision' as defined under s 3 of the CJA and hence not appealable under O 56 r 1 of the RHC. The judgment debtor's appeal should be dismissed on this ground alone (see pp 534B–E, H–I, 535B–C).

(3) There was nothing in O 59 r 4(1) of the RHC to say that costs shall only be taxed at the end of the proceedings. In fact, O 59 r 4 gave the power to the court to use its discretion to deal with the question of costs at any stage of the proceedings or after the conclusion of the proceedings. In any event, O 59 r 4 of the RHC was not applicable to the present bankruptcy proceedings as s 75 of the Bankruptcy Act 1967 ('the Act') and rr 69 to 88 of the Rules provided express and specific provisions relating to costs in bankruptcy proceedings. In the instant case, r 69(1) of the Rules was the applicable provision (see pp 535H–I, 536B–C, E).

(4) Rule 69(1) of the Rules empowered the court to deal with the costs awarded at the end each particular application. As such, the court can entertain the judgment creditor's application for taxation of costs and the judgment creditor need not wait until the conclusion of the bankruptcy petition to have their bills of costs taxed (see p 536F–H).

**[Bahasa Malaysia summary**

Pemiutang penghakiman mengeluarkan satu notis kebankrapan ('BN') terhadap penghutang penghakiman. Selepas itu, penghutang penghakiman memfailkan satu afidavit, melalui lampiran 5A, di bawah k 95 Kaedah Kebankrapan 1969 ('Kaedah tersebut') untuk mengenepikan notis kebankrapan. Sebelum pembicaraan lampiran

5A, penghutang penghakiman membangkitkan bantahan awal menuduh BN yang tak sah ab initio. Penolong Kanan Pendaftar ('PKP') menolak bantahan awal dan mangarah kos dalam kausa. Selepas mendengar lampiraniran 5A, PKP menolak permohonan dengan kos. Penghutang penghakiman merayu terhadap keputusan PKP kepada hakim dalam kamar melalui lampiran 11A dan lampiran 15. Lampiran 11A telah ditolak dengan kos oleh hakim dalam kamar. Sebelum rayuan pembicaraan dalam lampiran 15, penghutang penghakiman memfailkan satu lagi permohonan dalam lampiran 25C bagi sebab untuk mengemukakan keterangan selanjutnya di hadapan hakim. Apabila rayuan dalam lampiran 15 dibicarakan, penghutang penghakiman menarik rayuan dan hakim membatalkan rayuan dengan kos. Berdasarkan semua perintah yang dibuat oleh KKP dan hakim mengenai kos terhadap penghutang penghakiman, pemiutang penghakiman memfailkan notis dalam lampiran 27 bersama dengan bil kos untuk ditaksirkan oleh penolong pendaftar. Bantahan awal penghutang penghakiman terhadap notis serta kos bil tidak dibenarkan dan ditolak dengan kos dan penolong pendaftar meneruskan dengan kes ini. Ini adalah rayuan penghutang penghakiman terhadap keputusan penolong pendaftar menolak bantahan awal penghutang penghakiman ke atas notis yang difailkan oleh sipiutang penghakiman. Penghutang penghakiman mengatakan, memandangkan yang prosiding kebankrapan belum lagi diselesaikan, pembicaraan notis dan kos bil mesti ditangguhkan sehingga tamatnya prosiding kebankrapan.

**Diputuskan**, membatalkan rayuan:

(1) Keputusan yang dibuat oleh penolong pendaftar, yang merupakan subjek rayuan, bangkit daripada bantahan awal oleh penghutang penghakiman. Keputusan yang dibuat oleh penolong pendaftar bukan keputusan muktamad bagi soalan taksiran kos. Kedua-dua pihak dapat menghujah kes-kes mereka semasa pembicaraan sebelum keputusan terakhir terhadap kos penetapan dibuat (lihat ms 533H–534B).

(2) Hak untuk merayu mesti berdasarkan peruntukan nyata undang-undang dan dalam kes ini, rayuan terhadap keputusan penolong pendaftar kepada hakim dalam kamar adalah tertakluk kepada A 56 k 1 KMT. Perkataan 'keputusan' dalam A 56 k 1 KMT sepertimana didefinisikan di bawah s 3 Akta Mahkamah Penghakiman 1964 ('AMP') bermakna '...penghakiman, hukuman ataupun perintah tetapi tidak termasuk sebarang keputusan yang dibuat semasa perbicaraan ataupun pembicaraan apa-apa kausa ataupun perkara yang tidak secara muktamad memutuskan hak pihak-pihak yang terlibat.' Keputusan penolong pendaftar tidak tidak memutuskan hak pihak-pihak dan tidak memberikan keputusan muktamad keatas isu utama yang dipertikaikan, tetapi semata-mata di atas persoalan prosedur.

Oleh itu, keputusan itu bukannya 'keputusan' seperti didefinasikan di bawah s 3 AMP dan oleh itu tidak boleh dirayu di bawah A 56 k 1 KMT. Rayuan penghutang penghakiman harus dibatalkan berdasarkan perkara ini sahaja (lihat ms 534B–E, H–I, 535B–C).

(3) Aturan 59 k 4(1) KMT tidak mengatakan kos hanya dapat ditetapkan pada penghujung prosiding. Malahan, A 59 k 4 memberi kuasa kepada mahkamah untuk menggunakan budi bicaranya dalam menimbangkan soalan kos pada sebarang tahap prosiding ataupun selepas kesimpulan prosiding. Walau bagaimanapun, A 59 k 4 KMT tidak diapplikasikan pada prosiding kebankrapan ini seperti s 75 Akta Kebankrapan 1967 ('Akta tersebut') dan kk 69 sehingga 88 Kaedah memberikan peruntukan nyata dan spesifik berkaitan dengan kos dalam prosiding kebankrapan. Dalam kes ini, k 69(1) Kaedah tersebut adalah peruntukan yang beraplikasi (lihat ms 535H–I, 536B–C, E).

(4) Kaedah 69(1) Kaedah tersebut memberi kuasa kepada mahkamah untuk berurusan dengan kos yang ditawarkan pada penghujung setiap permohonan. Oleh itu mahkamah dapat menimbangkan permohonan pemiutang penghakiman bagi penaksiran kos dan pemiutang penghakiman tidak perlu menunggu sehingga kesimpulan petisyen kebankrapan untuk mendapatkan bil kos ditaksirkan (lihat ms 536F–H).]

**Notes**

For cases on costs, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1934–1940.

For cases on appeal against registrar, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 571–582.

**Cases referred to**

*A Debtor (No 335 of 1947) Re; Ex parte HM The King v the Debtor* [1948] 2 All ER 533 (refd)

*Dato' Seri Anwar Ibrahim v PP* [1999] 1 MLJ 321 (refd)

*Saad Abas & Anor v PP* [1998] 4 CLJ 575 (refd)

*Tetuan J & S Holdings Sdn Bhd v A Karim bin Hasan & Anor* [2000] 6 MLJ 739 (refd)

**Legislation referred to**

Bankruptcy Act 1967 s 75

Bankruptcy Rules 1969 rr 69(1), (2), 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 95, 276

Court of Judicature Act 1964 s 3

Rules of the High Court 1980 O 56 r 1, O 59 r 4(1)

*R Sarengapani* (*Vendargon & Partners*) for the appellant. A
*Kong Yit Har* (*Siva Ram & Kong*) for the respondent.

**Ramly Ali JC**: This is an appeal by the appellant ('judgment debtor') (vide encl 31), against the decision of the learned deputy registrar made on 11 September 2001 whereby the learned deputy registrar dismissed the appellant's preliminary objection in respect of a notice (notis penetapan B kes) filed by the respondent ('judgment creditor') (vide encl 27). The said notice and the related bill of costs was fixed for hearing before the learned deputy registrar on 11 September 2001. Before the hearing, counsel for the appellant had raised a preliminary objection to the effect that the whole bankruptcy proceeding had not been completed yet and that there was no order to the effect that costs must be paid forthwith; therefore the hearing C of the notice as well as the bill of costs (as in encl 27) must be deferred until the final conclusion of the bankruptcy proceedings. The learned deputy registrar overruled and dismissed the said preliminary objection and proceeded to hear the notice as well as the bill of costs. The appellant was not satisfied with the said decision and hence the appeal. D

*Brief background of the case*

The respondent issued a bankruptcy notice against the appellant which was served on the appellant on 25 April 1996 vide Bankruptcy Notice No 29–185–96. On 2 May 1996, vide encl 5A, the appellant filed an affidavit under E r 95 of the Bankruptcy Rules 1969 ('the Rules') to set aside the bankruptcy notice. On 5 November 1996 the appellant raised a preliminary objection (before hearing of encl 5A) to the effect that the said bankruptcy notice was void 'ab initio'. The said preliminary objection was overruled and dismissed with costs by the then senior assistant registrar. The learned assistant registrar also made an order that costs shall be in the cause. Enclosure 5A F was then heard by the learned senior assistant registrar and on 4 August 1997 he dismissed the application with costs. The appellant then appealed against the said decisions of the senior assistant registrar to the judge in chambers vide encl 11A and encl 15 (against the decision of the senior assistant registrar made on 5 November 1996 and 4 August 1997). The first appeal (encl 11A) was dismissed with costs by the judge in chambers. G Before the hearing of the second appeal (encl 15), the appellant filed another application (vide encl 25C) for the purpose of adducing further evidence before the judge. This application was also dismissed with costs by the judge. The second appeal (encl 15) came for hearing on 8 August 2000. The appellant withdrew the appeal. The judge then struck off the appeal H with costs. Based on all those orders made by the senior assistant registrar and the judge in respect of costs against the appellant, the respondent filed a notice (encl 27) together with the bill of costs to be taxed by the learned deputy registrar. The appellant's preliminary objection against the said notice and bill of costs was overruled and dismissed with costs and the learned deputy registrar proceeded to deal with the matter accordingly. The I said dismissal of the appellant's preliminary objection is the subject matter of the present appeal.

*Appellant's arguments*

The appellant argued that the bankruptcy proceeding initiated by the respondent against the appellant had not been completed yet; therefore the hearing of the notice and bill of costs must be deferred until the final disposal of the bankruptcy proceedings, ie when the bankruptcy petition is filed, heard and finally an adjudication order and receiving order are made by the court against the appellant. In the present case, the bankruptcy petition against the appellant has not been filed yet by the respondent. The appellant further argued that there is no provision for costs to be taxed unless it is made at the stage of the petition, not before that. The appellant cited that r 69 of the Rules must be read together with O 59 r 4 of the Rules of the High Court 1980 ('the RHC') and r 276 of the Rules, to the effect that unless there is an express order made by the court that costs shall be paid forthwith, the costs must only be billed and taxed at the conclusion of the bankruptcy proceeding.

*Respondent's arguments*

To counter the appellant's arguments, the respondent had raised three issues, ie:

(1) that the ruling made by the learned deputy registrar on 11 November 2001 in dismissing the appellant's preliminary objection is not a 'decision' as defined under s 3 of the Courts of Judicature Act 1964, and is thus not appealable;

(2) that O 59 r 4 of the RHC is not applicable to bankruptcy matters; the relevant and applicable rules in the present case are provided under the Bankruptcy Act 1967 and Rules;

(3) that taxation of the bill of costs in the present case can be made at any interlocutory stage without having to wait until the final disposal of the bankruptcy petition.

*Findings of the court*

The issues to be decided by the court in the present appeal are as raised by the respondent in their arguments. I shall now deal with the issues one by one.

(i) Whether the learned deputy registrar's ruling made on 11 September 2001 is appealable

The relevant ruling made by the learned deputy registrar on 11 September 2001, which is the subject matter of the appeal, arises from a preliminary objection made by the appellant. The appellant's preliminary objection was overruled and dismissed by the learned deputy registrar. The effect of the ruling is that the court shall proceed to hear the respondent's applications for taxation of costs awarded in his favour against the appellant in a number of interlocutory applications since 1996, and not to defer the hearing until

the final disposal of the bankruptcy petition which has not been filed yet by the respondent. The ruling made is not a final decision on the question of taxation of costs. To rule that the court shall proceed to hear the respondent's application for taxation of costs as earlier fixed in the notice does not determine the issues at hand in taxation of costs as applied. Both parties still have the chance to argue their respective cases during the hearing before the final decision on the taxation of costs is made. The ruling does not in anyway finally dispose of the rights of the parties.

The right of appeal must be based on express provisions of law. NH Chan JCA in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [1999] 1 MLJ 321 said (at p 329):

> There is no right of appeal at law from a decision of a court to any other court unless there is a statutory provision which gives a right to appeal.

In the present case, the appeal is against the decision of the learned deputy registrar to the judge in chambers. Order 56 r 1 of the RHC provides:

> (1) An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.

The word 'decision' as defined under s 3 of the Courts of Judicature Act 1964 (as amended by Act A 1031 in 1998) means 'judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.'

In *Dato' Seri Anwar Ibrahim*'s case, the Court of Appeal ruled that 'what the 1998 amendment means is that, a judgment or order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s 3 of the Courts of Judicature Act, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter which it deals.'

In another Court of Appeal's case, *Saad Abas & Anor v Public Prosecutor* [1998] 4 CLJ 575, Lamin PCA also ruled that (at headnote):

> Be that as it may, whether it is a judgment, decision or order pronounced by a court, there must be an element of finality before there can be an appeal.

Even though both the above cases (*Dato' Seri Anwar Ibrahim* and *Saad Abas*) are criminal in nature, the interpretation of the words 'decision, judgment and order' in those cases is also applicable to civil cases such as in the present appeal. The interpretation involves the definition of the word 'decision' as found in s 3 of the Court of Judicature Act 1964. The ruling of the learned deputy registrar in the present case does not deal with the final rights of the parties, and does not give a final decision on the main issue in dispute, but is merely on a matter of procedure. Therefore I am convinced that the said ruling is not a 'decision' as defined under s 3 of the Courts of Judicature Act and is therefore not appealable under O 56 r 1 RHC 1980.

In this respect, I am in full agreement with VT Singham JC in *Tetuan J & S Holdings Sdn Bhd v A Karim bin Hasan & Anor* [2000] 6 MLJ 739, when he said (at p 748):

> The court is of the view that if a party is allowed to appeal against a ruling or decision made on a preliminary objection before the start of a trial or during the trial which decision does not determine or finally dispose of the rights of the parties as spelt out in s 3 of the Courts of Judicature Act 1964, the High Courts will be flooded with appeals and have to deal with those appeals as speedily as possible in order not to prolong the trial in the lower courts which will be pending the outcome of the appeal.

Based on the above considerations, I am of the view that the appellant's appeal as per encl 31 can and should be dismissed with costs, on that ground alone.

In the event I am wrong in coming to the above conclusion, I shall now deal with the appeal on its merit.

(ii) Whether O 59 r 4 of the RHC is applicable

Bankruptcy matters are dealt with under the Bankruptcy Act 1967 and Rules. Matters pertaining to costs in bankruptcy proceedings are dealt with under rr 69–88 of the Rules. However, r 276 of the Rules provides that the Rules of the High Court shall be applicable to bankruptcy proceedings in the event of lacunae. Rule 276 provides:

> In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, mutatis mutandis.

Relevant to the present appeal, r 69(2) of the Rules provides:

> (2) Unless the Court otherwise directs, the costs of an opposed application shall follow the event and shall be taxed as between party and party.

On the other hand, O 59 r 4(1) RHC 1980 provides:

> (1) 'Costs' may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the Court for the payment of any costs may, if the Court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

The appellant argues that by virtue of r 276 of the Rules, O 59 r 4(1) of the RHC should be applicable to the present case and contended that under the said O 59, unless the order expressly provides that the costs must be paid forthwith, then the costs ordered must be taxed at the end or the conclusion of the bankruptcy petition against the appellant. With respect, I cannot agree with the appellant's argument on this issue. Firstly, O 59 r 4(1) of the RHC does not specifically support the appellant's contention. There is nothing in the said order to say that costs shall only be taxed at the end of the proceedings. In actual fact, the said order gives the power to the court to use its discretion to deal with the question of costs at any stage of the proceedings or after the conclusion of the proceedings. The appellant cannot adopt his own interpretation just to suit his own taste. It is trite that

any interpretation must not be contrary to the clear wordings of the statute. This principle had been laid down by Lord Greene MR in *Re A Debtor (No 335 of 1947); Ex parte HM The King v The Debtor* [1948] 2 All ER 533 (at p 536) when he said:

> If there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words used.

Secondly, I am of the view that O 59 r 4(1) of the RHC is not applicable to the present bankruptcy proceedings. The strength of the appellant's argument is that O 59 r 4(1) of the RHC is applicable by virtue of r 276 of the Rules. The key words in r 276 is 'in the absence of any rule regulating any proceedings under the Act or these Rules ...'. Section 75 of the Bankruptcy Act 1967 and rr 69–88 of the Rules provide express and specific provisions relating to costs in bankruptcy proceedings. The most relevant provisions relating to the present case are as provided under r 69(2) of the said Rules, ie 'unless the court otherwise directs, the costs of an opposed application shall follow the event and shall be taxed as between party to party'.

This rule clearly indicates that unless the court otherwise directs, the costs of an opposed application shall follow the event, ie at the end of each particular application, not at the conclusion of the main action.

Obviously the provisions of r 69(1) of the Rules differ from the provisions of O 59 r 4(1) of the RHC, even though they touch on the same issue, ie at what stage of the proceedings costs can be dealt with by the court. That being the case, I am satisfied that O 59 r 4(1) of the RHC is not applicable in the present case. The applicable provisions are r 69(1) of the Rules.

(iii) Whether taxation of bill of costs in this case can be dealt with before the conclusion of the bankruptcy petition

The applicable r 69(1) of the Rules clearly empowers the court to deal with the costs awarded at the end of each particular application. In other words, the court can entertain the respondent's application for taxation of costs as applied vide encl 27. The relevant orders relating to costs made against the appellant in this case were made on 5 November 1996, 4 August 1997, 28 July 1999, 27 June 2000 and 8 August 2000. Except for the first order made on 5 November 1996, all the other four orders were made without any other direction. The orders made on all the four occasions were to the effect that 'application dismissed with costs'. In these circumstances, it is clear from the wording of r 69(1) of the Rules that these costs shall follow the event, ie can be dealt with at the end of each application. The respondent need not have to wait until the conclusion of the bankruptcy petition to have his bill of costs taxed.

As for the first order made on 5 November 1996, the order made was 'costs in the cause (kos dalam kausa)'. This order was in respect of the appellant's preliminary objection in relation to the appellant's application

under r 95 (encl 5A), to set aside the bankruptcy notice issued by the respondent against the appellant. Before the hearing of the said application, the appellant chose to raise a preliminary issue, ie that the said bankruptcy notice was void 'ab initio'. The learned senior assistant registrar heard the preliminary objection first and dismissed it with costs and ordered that the said costs be in the cause. The actual application to set aside the bankruptcy notice (encl 5A) was adjourned to and heard on 4 August 1997 where it was also dismissed with costs. Therefore, the order made on 5 November 1996, in respect of a preliminary objection relating to encl 5A, must relate to the main cause in encl 5A itself. So, when the order says 'costs in the cause', it means that the costs of the preliminary objection made on 5 November 1996 must be included in the costs of the application (encl 5A) made on 4 August 1997. Therefore, when the court made an order 'dismissed with costs' in respect of the application (encl 5A) on 4 August 1997, both the costs awarded on 5 November 1996 and 4 August 1997 can be dealt with and taxed at the end of the application (encl 5A).

*Conclusion*

On the above consideration, I am of the view that the appellant's appeal vide encl 31 is without merit. Therefore, the appeal is dismissed with costs.

*Appeal dismissed.*

Reported by Lim Lee Na